UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

LONGWOOD SECURITY SERVICES, INC. Employer and UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA INTERNATIONAL UNION AND ITS LOCAL 365 Petitioner	Case No.: 01-RC-145376

BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS

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Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), Longwood Security Services, Inc. ("Longwood" or "Employer") files this brief in support of its exceptions to the Hearing Officer's Report on Objections ("Report").

INTRODUCTION

The Employer respectfully requests that the Board overrule Union Objection No. 3, reject the recommendations of the Hearing Officer as to Objection No. 3 and issue a Certification of Results of Election. Failure to grant the Employer's requested relief will mean the votes of the employees'—a majority of whom voted against union representation—will be cast aside through no fault of their own or of the Employer, and a decision to sustain the objection will place at risk in a rerun election their vote to decline union representation. The Union seeks nothing less than to use the Board as cover to vacate the votes of the majority of employees who voted against

union representation and give it a second bite at the apple due to nothing more than a technicality.

The Employer is entitled to the relief it seeks for several reasons. First, the Stipulated Election Agreement expressly limits observers to "non-supervisory-employee observers." The Board agent refused to let the Union's East Coast Director, James Natale, who was neither "non-supervisory" nor an "employee" serve as the Union's observer, consistent with the agreement that the parties made and the Regional Director approved in the Stipulated Election Agreement.[1] Second, the Board agent's decision spared employees who chose to vote from having to face a high-ranking union official—a clear partisan—as each entered the voting room and stated their respective name. As word of Natale's presence in the voting place circulated among the employees, some may have chosen not to vote in the election. The Board agent's decision merely refereed the rules the parties had set—no less than when she enforced the voting times to which the parties agreed and set forth in the stipulated election agreement. Third, had the Board agent allowed Natale to serve as an observer, the election results would have been unchanged as the Hearing Officer found that Natale raised no issues regarding the voter list and Natale conceded that he probably would not have challenged anyone. (Report, pp. 5-6).

STATEMENT OF THE CASE

On January 30, 2015, the United Government Security Officers of America International Union and its Local 365 ("Petitioner" or "Union") filed a petition with Region One of the NLRB seeking to represent "all full-time and regular part-time special police officers" working for Longwood. (Report, p. 2). On February 13, 2015, the Regional Director for Region One approved a Stipulated Election Agreement pursuant to which a manual ballot election was

[1] There is no evidence that the Employer's representative at the pre-election conferences took any position regarding Natale serving as an observer.

conducted on March 13 and 14, 2015 with a tally of ballots immediately prepared and distributed to the parties after the second voting session.

The Tally of Ballots showed that there were 70 eligible voters, and the count showed that 26 votes were cast in favor of representation and 30 votes were cast against representation. There were no void or challenged ballots.

On March 19, the Union timely filed its Objections to the Conduct of the Election. At the hearing, the Union withdrew Objection No. 1 and Objection No. 4. In his Report, the Hearing Officer recommended that Objection No. 2 be overruled. The Hearing Officer also recommended that Objection No. 3, that Natale was not permitted to serve as an observer, be sustained.

On June 24, the Employer filed its Exceptions to the Hearing Officer's Report on Objection and Brief in Support of Employer's Exceptions to the Hearing Officer's Report on Objections. On that date, the Employer also filed its Motion to Take Judicial Notice of a Board Document.

ARGUMENT

I. THE UNION'S PROPOSED OBSERVER IS NOT AN EMPLOYEE—OF ANY EMPLOYER—AND IS A STATUTORY SUPERVISOR AND HIS SERVICE AS AN OBSERVER WOULD HAVE BEEN A DIRECT VIOLATION OF THE STIPULATED ELECTION AGREEMENT.

The stipulated election agreement—signed by the parties and approved by the Regional Director—is perfectly clear that each observer, in addition to being "authorized,"[2] must be a "non-supervisory-employee." Natale was neither "non-supervisory" nor an "employee." Rather, as the East Coast Regional Director for the Petitioner, Natale is quite obviously, a statutory supervisor for the Union[3] and, consequently, not a statutory employee of any employer.[4] The

[2] As Natale, a director in the Union was proposing himself as the observer, there is no issue that he was "authorized."

[3] Section 11310.2 of the Casehandling Manual for Representation Elections, while used for guidance, provides that "[a] supervisor should not serve as an observer."

Board agent acted appropriately to enforce the stipulated election agreement, the only document which reflects the basis for the election at all and the specific, mutually agreed upon and approved terms of the election. The Board agent could no more permit someone other than a "non-supervisory-employee" serve as an observer than she could ignore the voting times set forth in the stipulated election agreement.

A. The Board Agent Assured that the Stipulated Election Agreement Was Enforced, and Not Breached.

The terms for the election are set forth in the stipulated election agreement. The rules set forth therein for observers are at paragraph 10:

> **10. OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

The parties agreed, and the Regional Director approved, that the observers each be "non-supervisory" and an "employee." Natale was neither. The Union understood this rule: the Union advised the Region prior to the election that it planned to use an employee as its observer. When that employee told the Union he was unavailable to serve, Natale attempted to substitute for him.[5] Unfortunately, Natale is plainly ineligible under the express terms of the stipulated election agreement. The Employer is absolutely entitled to have the election to which it agreed run in accordance with the terms to which it agreed. The Board agent's decision enforced that agreement.

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[4] Further, Section 11310.2 provides that "[a] union official should not serve as an observer unless he/she is also an employee of the employer." There is no evidence that Natale works for Longwood.

[5] There is no evidence that Natale or anyone else in this union of national breath made any effort to secure the services of any other employee to serve as an observer. Indeed, 24 votes were cast for the Petitioner. Presumably with even a modicum of effort, the Union could have persuaded at least one of those voters to serve as its observer. *See also Browning-Ferris, fn. 1.*

Contrary to the Hearing Officer's Report, the principles articulated in *Browning-Ferris Industries of California*, 327 NLRB 704 (1999) do not compel a finding that the Board agent's decision constituted a material breach of the stipulated election agreement. In *Browning-Ferris*, Member Hertgen, dissenting, wrote that "...my colleagues note that the [stipulated election] agreement said only that observers must be employees, it did not expressly say that observers had to be employees 'of the employer'." *Id.* at 705. *Browning-Ferris* focused on whose employees—the employer who was party to the stipulated election agreement or some other employer—could serve as an observer. The Board there did not address the question presented here: was the proposed observer an employee at all? That threshold issue—critical in the instant case—was not considered (as it did not need to be) in *Browning-Ferris.*

Even if the Board views *Browning-Ferris* to be of some import, the case only demonstrates that the Board agent acted correctly. In *Browning-Ferris*, the Board did not need to consider the requirement in the stipulated election agreement that each observer be a "non-supervisor employee." It was not at issue. Here, the Board must consider the fact that the word "observer," as it used in the stipulated election agreement, does not stand alone. Rather, "observer" is modified by the words "non-supervisory-employee." The three words must be read together here. If the Board fails to do so, it would unilaterally and deliberately delete from and amend the stipulated election agreement. By so doing, the Board would negate the specific agreement of the parties, an agreement ratified, of course, by the Regional Director. The parties are not merely entitled to an "observer." They, instead, may have a specific character of observer: a "non-supervisory-employee observer." The Board agent preserved the Employer's contractual rights embodied in the stipulated election agreement. Objection No. 3 is an invitation

for the Board to write those words out of the stipulated election agreement. With all due respect, the Board is not empowered to do so.

The determination whether there has been a material breach of the stipulated election agreement can only be made after it is determined what the terms of that agreement are. Only then can the facts be applied to determine if there is a material breach. Here, there may have been a material breach if the Board agent had denied the Union a "non-supervisory-employee observer." But, she did not, because the Union did not present a "non-supervisory-employee observer." Rather, the Union presented a "supervisor observer." Neither the Union nor the Employer may have used a "supervisor observer" in the election. Those words—standing alone—are not terms in the stipulated election agreement. Consequently, there was not a material breach of the stipulated election agreement, and the Hearing Officer's recommendation should be rejected.

Breman Steel Co., 115 NLRB 247 (1956), which is cited by the Board in *Browning-Ferris*, also did not address the question whether the proposed observer was a statutory employee. Rather, the case concerned the erroneous direction of the Board agent that the employer could not use a member of the bargaining unit as an observer. However, *Breman Steel* is instructive with regard to the necessity of according the stipulated election agreement the sanctity of a contract: "The stipulated election agreement, the Board, with judicial approval, [footnote omitted] has consistently treated a consent-election agreement as binding upon the parties." *Id.* at 249. As the terms of a stipulated election agreement are "binding upon the parties," it is axiomatic that those terms are also binding on the Board which is charged with enforcing those terms, and not just one of those terms, but all of those terms.

B. <u>The Board Agent Prevented Natale, as a Supervisor and not an Employee, from Potentially Intimidating Employees Who Presented Themselves to Vote or Intimidating Employees Who May Have Declined to Present Themselves to Vote Based on Natale's Presence at the Voting Place.</u>

In *Embassy Suites Hotels, Inc.*, 313 NLRB 302 (1993), the Board noted that Section 11310 of the Casehandling Manual for Representation Elections is "'aimed primarily at intimidation that might take place should the *employer* choose to have *supervisory* employees present,' *Diamond International Corp. v. NLRB*, 646 F.2d 1, 3 (1st Cir. 1981)." By describing this as the primary purpose of the rule, the Board necessarily concedes that there are secondary purposes, one of which is undoubtedly aimed at the intimidation that might take place should the *union* choose to have one of *its supervisory* employees present. Natale's presence as a senior official of the Union would have had an unavoidably coercive effect on voters. Natale is a partisan, no less that an employer's supervisors could be viewed as partisan. The employees could understand that if the union is certified that he will hold a position of authority over them as members of the foregoing unit and likely, the Union. His presence could have causing voter suppression which would have been to the detriment of the Employer and the employees who did vote against union representation.

Employees who showed up to vote might have been immediately concerned by Natale's presence in the voting room, questioned the impartiality of the election process and been unnerved to have to state their names. Some employees who presented themselves to vote may have turned and left. Others who had not yet gone to the polls may have heard of his presence and decided not to vote. The only certainty is that the employees planning to vote for the Petitioner would have voted, as they would been buoyed by their leader's presence. It is exactly that situation—caused either by the presence of a supervisor of the employer or a high-ranking

official of the union—that Section 11310 was written. The Board agent prevented this possibility, and she was correct to have done so.

The last paragraph of Section 11310.2 which states the "unresolved issues should be left to the objections process" surely was intended to provide a shield to the party which lost the election due to the presence of a supervisor or union official as an observer and not to furnish a sword to the party which lost the election who was not allowed to seat an ineligible supervisor or union official as an observer. Even if that is not the case, as argued below, the Union suffered no actual harm by Natale not serving as an observer.

C. Had Natale Served as the Union Observer, the Results of the Election Would Not Have Changed.

In this case particularly, the Hearing Officer's recommendation urges a perverse result. Had Natale been allowed to serve as an observer, the election result would not have changed one iota. The Hearing Officer noted the following from Natale's testimony:

> Natale confirmed that prior to the election, the Union was unaware whether the *Excelsior* list contained the names of any supervisors or other ineligible employees, and the Union has no plans to challenge the eligibility of any voters whose name were listed thereon. ... Natale further testified that he didn't raise any eligibility concern or questions regarding any employee on the voter list during the pre-election conference or at any other time prior to the election ... [or] at the conference held just prior to the second voting session. Natale testified that the Union may have challenged between three to six individuals that it might have considered to be supervisors, though he was unable to identify any by name. When pressed, Natale testified that he likely would not have challenged anybody.

(Emphasis added). (Report, pp. 5-6). The only individuals that Natale may have challenged, he testified, were any superior officers who showed up in uniform with rank insignia displayed. (Report, p. 5). But the Board agent would have challenged a superior officer as his or her name would not have been on the *Excelsior* list, and the Tally of Ballots shows no challenged ballots.

In actuality, Natale would have challenged no one and the results of the election who have been unchanged had he served as an observer.

If the Hearing Officer's recommendation as to Objection No. 3 is adopted, the employees' majority decision in the election will be vacated, the Employer and employees will need to endure a rerun election and the Union will be given a second bite of the apple without justification. The recommendation defies reality and pays homage to a technicality. This should be unacceptable.

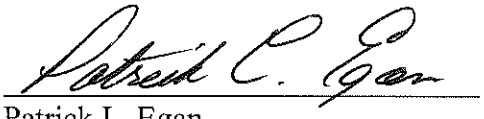
CONCLUSION

The Hearing Officer erred when he recommended that the Union's Objection No. 3 be sustained and that a rerun election be held. For all of the reasons set forth above, the Board should order that the objection be overruled and that a Certification of Results of Election be issued.

Respectfully submitted,

LONGWOOD SECURITY SERVICES, INC.,

By their attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 20154, I caused the foregoing *Brief In Support Of Employer's Exception To The Hearing Officer Report On Objections* to be served electronically upon the following individuals:

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